CF0000064183

(2)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR.

Cr.Appeal No. 1338 /2000. Division Bench (Criminal)

Appellants (In Jail) : 1- Shivkumar son of Itwari Sinha, aged 28 years, Labourer.
2- Vishnu son of Itwari Sinha, aged 25 years, Agriculturist.
3- Kanhaiya, son of Itwari Sinha, aged 20 years, Labourer.
All residents of village Arjuni, Police station Dongargaon, district Rajnandgaon, M.P.

Versus.

Respondent : State of Madhya Pradesh.

Criminal Appeal under section 374(2) of the Cr.P.C.

AFR

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

(DIVISION BENCH)

Criminal Appeal No.1338 of 2000

Shivkumar and two others

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
Dilip Raosaheb Deshmukh
Judge

HON'BLE MR. JUSTICE L.C. BHADOO

Sd/-
L.C.BHADOO
Judge

POST FOR JUDGMENT ON 1ST JULY, 2005

Sd/-

JUDGE
30.06.2005

(61)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Criminal Appeal No.1338 of 2000

Shivkumar and two others

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Present: -

Mr. Abhay Tiwari, Advocate: For the appellants.

Mr. Sachin Singh Rajput, Panel Lawyer: For the State/respondent.

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND

HON'BLE MR. DILIP R. DESHMUKH, JJ.

JUDGMENT

(Delivered on 1st July, 2005)

The following judgment of the Court was delivered by *Dilip R. Deshmukh, J*: -

1. The appellants have assailed their conviction and sentence awarded vide judgment dated 28-4-2000 passed in Sessions Trial No.140/98, delivered by Mr. H.R. Agwan, Additional Sessions Judge, Rajnandgaon, in this appeal.

2. All the appellants have been convicted for offence under Section 302 of the I.P.C., in the alternative under Section 302 read with Section 34 of the I.P.C. for committing the murder of Shyamacharan Soni and sentenced to undergo imprisonment for life and pay a fine of Rs.2,000/- each, in default of payment of fine to further undergo R.I. for nine months each. The appellants have also been convicted under Section 307 of the I.P.C., in the alternative under Section 307 read with Section 34 of the I.P.C. for attempting to commit murder of Ramesh Chandra Soni and sentenced to undergo R.I. for five years and pay a fine of Rs.1,000/- each, in default of payment of fine to further

undergo R.I. for six months each. The appellants have been further convicted under Section 324 of the I.P.C., in the alternative under Section 324 read with Section 34 of the I.P.C. for voluntarily causing hurt by means of scissor to Shyamabai and sentenced to undergo R.I. for one year and pay a fine of Rs.500/- each, in default of payment of fine to further undergo R.I. for one year. Appellant Shivkumar has also been convicted under Sections 341, 323 & 323 of the I.P.C. for wrongfully restraining Manoj Kumar on the road and for causing simple hurt to Manoj Kumar & Ramesh Chandra Soni and sentenced to undergo S.I. for one month, three months and again three months, respectively.

3. It is not disputed that appellants Shivkumar, Vishnu & Kanhaiya are brothers and sons of acquitted accused Vimlabai. Deceased Shyamacharan Soni, Ramesh Soni (PW-1) and Haricharan Soni (PW-3) are sons of Shyamabai (PW-2). The appellants and the above mentioned witnesses have their houses at Village: Arjuni, Police Station: Dongargaon, District: Rajnandgaon on either side of the road.

4. Briefly stated, the prosecution case is that a day before the occurrence i.e. on 29-6-1998 Dr. Manoj Kumar was sitting in his clinic situated in Village: Arjuni, with Ramesh Chandra Soni (PW-1). In the evening, appellant Shivkumar came to the clinic while being drunk, threw the chair upside down and asked Ramesh Chandra Soni to lift the chair, whereupon Ramesh Chandra Soni lifted the chair. Appellant Shivkumar again threw the chair and repeated the order whereupon, Ramesh Soni again lifted the chair. However, when appellant Shivkumar for the third time repeated the act, Ramesh Soni refused to lift the chair, whereupon there was a scuffle. Report of the incident was lodged by Ramesh Soni on 29-6-1998 at 8.10 p.m. vide Roznamcha Sanha No.698 Ex.P-37(A) in Police Station: Dongargaon. Ramesh Chand Soni was sent for medical examination. Dr. G.L. Saraf (PW-8) examined him and found (i) abrasion 0.2 x 0.2 cm. on the base of right thumb; (ii)

abrasion 2 x1 cm. on the 4th right finger; and (iii) abrasion 1 x1 cm. on the middle side of left leg.

5. On the next day i.e. 30-6-1998 in between 6 & 6.30 a.m. when Dr. Manoj Badhai was returning on his Hero Puch bearing registration No. MP-24/EF-6232, appellant Shivkumar stopped him on the road near his house and assaulted him by Lathi. Pergiabai (PW-6) who was cleaning utensils in front of her house saw Manoj (popularly known as Bengali doctor) being assaulted by Shivkumar and shouted. Hearing her shouts Shyamacharan, whose house was in close vicinity, went to intervene whereupon, Shivkumar also assaulted Shamacharan by Lathi. Shyamabai had on hearing the shouts seen that Shyamacharan was going towards Manoj @ doctor and she asked her son Ramesh Soni (PW-1) to see what was happening and went inside the house to wake up her second son Haricharan (PW-3). She and Ramesh Soni seeing appellant Shivkumar assaulting Shyamacharan with Lathi went to intervene. Seeing this, appellants Vishnu & Kanhaiya armed with scissor and iron pipe respectively, came running from their house. Appellant Vishnu stabbed Shyamacharan in the right side of chest by scissor and inflicted more injuries on the left upper arm and posterior lateral aspect of fore arm. Appellant Shivkumar assaulted Shyamacharan by Lathi on the right side of chest. When Ramesh (PW-1) & Shyamabai (PW-3) intervened appellant Vishnu assaulted Ramesh by scissor and inflicted injuries on left side of his chest, left leg, right leg, and left thigh. While he was about to inflict another injury on the neck of Ramesh Soni who had fallen on the ground Shyamabai covered Ramesh Soni, whereupon an incised wound on the scalp of Shyamabai over right parietal region was caused. Appellant Kanhaiya also assaulted Shyamacharan & Ramesh Soni by an iron rod. At this juncture Haricharan Soni PW-3, S/o Shyamabai also arrived at the spot and pushed appellant Vishnu on the ground. Krishna Kumar Dewangan & Kunwariya bai also saw the occurrence.

6. Shyamacharan & Ramesh Soni were shifted to the District Hospital, Rajnandgaon by Haricharan (PW-3) and Shyamabai (PW-2). Shyamacharan succumbed to the injuries in the hospital on the same day. Merg intimation Ex.P-2 was given by Haricharan Soni (PW-3) in Police Station: Rajnandgaon on 30-6-1998 at 9 a.m. Dehati Nalishi Ex.P-1 was written by B.L. Dhargaon, Sub Inspector (PW-19). The offence was registered at Police Station: Dongargaon vide Ex.P-17.

7. Post-mortem was conducted on 30-6-1998 at 12.40 p.m. on the dead body of Shyamacharan by Dr. Harish Kumar Joshi (PW-9) who found following injuries on Shyamacharan: -

   i) one penetrating injury over the right side of chest over 4th inter costal space 3.5 cm. lateral to margin of sternum, fusi-form shape length-1 cm., width-2 cm. penetrating through skin fascia; musculature pericardium into right upper cavity of heart through its postero lateral wall penetrating length 8.5 cm. The opening in heart Muller pea size;

   ii) one penetrating injury over the left upper arm 4" below the shoulder joint anterior aspect depth up to bone; 2 cm. long 1 cm. wide;

   iii) one contusion over the right side of chest at the level of 7th rib 2.5 cm. medial to mid nipper line circular 1.5 cm. diameter, soft;

   iv) one abrasion over the anterior aspect of left knee joint, Muller pea size and shape;

   v) one lacerated wound over the posterior lateral aspect of forearm 1.5 cm. below the right elbow joint Muller pea size, clotted blood present; and

   vi) mark of venal section over the right ankle joint medical aspect, bandage on it.

   On dissection it was found that the penetrating injury was in the right chamber of heart which caused the death of Shyamacharan. The injuries sustained were anti-mortem.

8. Rameshchandra Soni was also sent for medical examination on 30-6-1998. Dr. Y.K. Tiwari PW-18 found following injuries on his person.

   i) incised wound at left chest 1 " x 1" x ½"

   ii) incised wound at left leg mid 1/3rd 1" x ½" x ¼"

   iii) incised wound at right leg from 1/3rd 1" x 1/4" x 1/4"

   iv) incised wound at left thigh posterior aspect 1" x ¾" ½"

   v) abrasion in hand ¼ "x ¼" with blood clot.

   In the opinion of Dr. Tiwari PW-18 injury No.1 was grievous in nature while other injuries were simple injuries. The injuries were caused by sharp edged weapon within 24 hours.

9. Shyamabai PW-2 was also examined on 30-6-1998 by Dr. Y.K. Tiwari who found one incised wound at scalp 2" x 1 ½" at right parietal region which could be caused by a sharp edged object within 24 hours. X-ray of left hand of Manoj Kumar was taken on the same day which did not show any bony injury.

10. Sub Inspector B.L. Dhargaon PW-19 after inspection of the spot and the dead body of Shyamacharan which was kept in a jeep at District Hospital, Rajnandgaon prepared Panchanama Ex.P-28 on 30-6-1998. Manoj Kumar @ doctor and Haricharan Soni were sent for medical examination. Dr. Miss K. Gangajaliwale PW-14 who examined Manoj Kumar found following injuries on his person. (i) Swelling & tenderness over left hand with restriction of movements of thumb; (ii) reddish bruise over left knee 8 x3 cm. with swelling; (iii) bruise over third finger of right hand 4 x ½ cm.; and (iv) bruise over back on left side 8 x 3 cm. reddish in colour. She also found one abrasion over wrist left hand 2 cm x ½ cm. on Haricharan Soni on 30-6-1998.

11. Investigation progressed. On 30-6-1998 Sub Inspector K.P. Banjare PW-15 prepared the spot map vide Ex.P-3 and seized blood stained soil and plain soil from the place of occurrence vide Ex.P-4. Hero Puch No.MP-24/EF-6232 lying at the scene of occurrence near the road was

also seized on 30-6-1998 vide Ex.P-5. From near the house of deceased Shyamacharan on 30-6-1998 one Sando Baniyan, one towel & one Kathri all of which had blood like stains were seized vide Ex.P-6. Appellant Vishnu was interrogated and on his memorandum Ex.P-8 Sub Inspector K.P. Banjare recovered one old rusted iron scissor which was 10 " in length and had blood like stains from the house of Vishnu on production by appellant Vishnu vide Ex.P-7. On 1-7-1998 at about 11 p.m. one full pant and one shirt were removed from the person of appellant Shivkumar and seized vide Ex.P-10. One iron pipe which was 46" long and ½" in diameter was seized from appellant Kanhaiya vide Ex.P-11 and one jeans full pant with blood like stains worn by him was also seized vide Ex.P-12. On the memorandum of Shivkumar Ex.P-16 one Lathi having blood like stains 47" in length was seized from appellant Shivkumar vide Ex.P-13. One jeans full pant and one baniyan having blood like stains worn by appellant Vishnu were removed and seized on 1-7-1998 vide Ex.P-14.

12. The appellants were arrested on 2-7-1998 vide Exs.P-33, 34 & 35. The seized articles were sent for chemical examination to the Forensic Science Laboratory, Raipur, which found vide report Ex.P-36 that blood like stains were present on the recovered and seized articles, viz., scissor at the instance of appellant Vishnu, Lathi recovered at the instance of appellant Shivkumar and iron pipe seized from appellant Kanhaiya. Blood like stains were also found on the Baniyan seized from appellant Vishnu. No blood stains were found on the clothes seized from appellants Shivkumar & Kanhaiya.

13. After completion of investigation, the appellants along with Vimlabai were prosecuted for offence under Sections 302 & 307 read with Section 34 of the I.P.C. Upon committal of case by the Judicial Magistrate, 1st Class, Rajnandgaon, on 28-9-1998, learned Additional Sessions Judge, Rajnandgaon framed charges under Section 302, in the alternative under Section 302 read with Section 34, Section 307, in

the alternative under Section 307 read with Section 34, Section 324, in the alternative under Section 324 read with Section 34 I.P.C. against all the accused persons, charges under Sections 341, 323, in the alternative under Section 323 read with Section 34 I.P.C. against appellants Shivkumar & Kanhaiya, and charge under Section 323 I.P.C. against appellant Shivkumar for voluntarily causing hurt to Ramesh Soni on 29-6-1998. The appellants abjured their guilt. Prosecution examined as many as 19 witnesses in support of its case. No evidence in defence was adduced. The trial Court relying upon the prosecution evidence convicted the appellants as shown in paragraph 2 supra while acquitting accused Vimlabai, mother of the appellants from all charges.

14. Learned counsel for the appellants has assailed the impugned judgment on the ground that non-examination of material eyewitnesses as well as injured Dr. Manoj, makes the prosecution evidence doubtful. The testimony of Ramesh Soni PW-1, Shyamabai PW-2 & Haricharan Soni PW-3 ought not to have been relied upon by the trial Court as it was not of sterling quality and also not supported by medical evidence. It was further argued that no common intention of appellants Shivkumar & Kanhaiya for committing the murder of Shyamacharan or attempting the murder of Ramesh Soni as also for causing injuries by a sharp cutting object on Shyamabai was made out from the prosecution evidence. He also argued that the appellants were sent for medical examination as late as on 2-7-1998. The appellants had sustained injuries during the occurrence, which in the opinion of Dr. Ramteke (PW-11) could have disappeared within 24-48 hours. For these injuries no explanation was given by the prosecution, which rendered the prosecution case doubtful.

15. On the other hand, learned Panel Lawyer for the State argued that despite best efforts by the prosecution Manoj Kumar alias doctor could not be produced for testifying before the trial Court and therefore, no adverse inference could be drawn against the prosecution. He also

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contended that the injuries sustained by deceased Shyamacharan as well as Ramesh Kumar & Shyamabai bring home the guilt under Sections 302, 307 & 324 of the I.P.C. against appellant Vishnu beyond all reasonable doubt and the testimony of these injured witnesses was wholly reliable which proved that appellants Shivkumar & Kanhaiya had also participated in furtherance of common intention of the appellants, and therefore, the conviction and sentences imposed upon them by the trial Court was based on legal evidence and ought to be sustained. He supported the judgment of the trial Court and prayed that the appeal deserves dismissal.

16. We have considered the rival arguments and we have also perused the record of the trial Court minutely. We shall first take up the incident, which took place on 29-6-1998 in the clinic of Dr. Manoj Kumar. Rameshchandra Soni PW-1 has stated that while they were sitting in the clinic of Dr. Manoj at about 7 p.m. on 29-6-1998 appellant Shivkumar came in drunken state inside the clinic, pushed the chair down and asked him to lift it back, when he did so, he again pushed the chair down and again asked him to lift it. He again lifted the chair. While on the third occasion the appellant again pushed the chair down he refused to lift it whereupon, there was exchange of hot words during which appellant Shivkumar caught hold of his throat and there was a scuffle between them. Roznamcha Sanha No.698 lodged by Ramesh Soni on 29-6-1998 Ex.P-37 (A) has been proved by Head Constable Bhaiyalal Patel PW-16. The injury report of Ramesh Soni dated 29-6-1998 Ex.P-21 has been proved by Dr. G.L. Saraf (PW-8), which shows that he had three very superficial abrasions on the right thumb, on the right middle finger and on the middle of left leg. Thus, the testimony of Ramesh Soni (PW-1) regarding the injuries caused by appellant Shivkumar on 29-6-1998 in the clinic of Manoj is un-rebutted and supported by medical evidence. It thus appears that appellant Shivkumar wanted to square the score and assaulted Ramesh Soni on 30-6-1998 also lends support to the inference that it was in retaliation

to the incident on 29-6-1998 in which Ramesh Soni had disobeyed his command which was followed by a scuffle. It is thus, fully established that on 29-6-1998 appellant Shivkumar had voluntarily caused hurt to Ramesh Soni, and thereby committed an offence under Section 323 I.P.C.

17. Dr. Manoj Kumar was not examined by the prosecution since he could not be served despite best efforts. He was repeatedly summoned by the Court, whereupon it was reported that he had left Village: Arjuni for some unknown place. He was even summoned on the Kolkata address and one Head Constable was also sent for effecting special service, but Manoj Kumar could not be traced and examined by the prosecution. The injury report of Manoj Kumar was however proved by Dr. Miss K. Gangajaliwale PW-14 who had found vide report Ex.P-30 that Manoj Kumar had sustained bruises over left knee, third finger of right hand and on the back of left side apart from swelling and tenderness over the left hand. Rameshchandra Soni PW-1, Shyamabai PW-2 and Haricharan Soni PW-3 have also not even said a word in their testimony as to how and why was Dr. Manoj injured and what was he doing at the time of occurrence. Pergiabai PW-6 has deposed that at about 6 a.m. on 30th June, 1998, while she was cleaning utensils in front of her house she saw that appellant Shivkumar was beating Dr. Manoj. However, she said that she cannot say as to by which weapon appellant Shivkumar was beating Manoj. This witness was cross-examined by the Additional Public Prosecutor with the permission of the Court and said therein that she had told that appellant Shivkumar had assaulted Dr. Manoj by a Lathi. The testimony of this witness was recorded on 21-4-1999 whereas, the testimony of Ramesh Soni had already been recorded on 20-4-1999. In cross-examination, she has admitted that she had come to testify with Ramesh on the day. We find that the testimony of Pergiabai fails to inspire confidence because, if she had seen the first part of occurrence with Dr. Manoj & appellant Shivkumar, she would have known about the later part also. She would have certainly known

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the weapon with which appellant Shivkumar had assaulted Dr. Manoj. The spot map Ex.P-3 prepared by Sub Inspector K.P. Banjare (PW-15) does not show that the house of this witness is situated any where near the place of occurrence.

18. Sub Inspector K.P. Banjare had seized vide Ex.P-5 Hero Puch No.MP-24/EF-6232 from the place of occurrence on 30-6-1998 at about 10 a.m. It is beyond doubt that Dr. Manoj definitely had a fall from Hero Puch and had neither received a laceration nor abrasion on his body, but had only received bruises. Dr. Miss K. Gangajaliwale PW-14 has in her cross-examination para 6 admitted that all the injuries sustained by Manoj could be caused due to fall from a moped. If appellant Shivkumar had really assaulted Dr. Manoj repeatedly by Lathi as was narrated in the F.I.R. Ex.P-18 "आज सूबह डा. बढाई जब स्नान कर वापस घर आ रहा था तब शिवकुमार ने उसे रोक लिया और उसे लाठी से खूब मारपीट कर रहा था" then Dr. Manoj would have certainly received abrasions, lacerations as well as contusions and not merely bruises. It is in this perspective that non-examination of Dr. Manoj by the prosecution becomes fatal for the prosecution so far as offence under Sections 341 & 323 of the I.P.C. in relation to Manoj Kumar Badhai are concerned. In the testimony of Rameshchandra Soni PW-1, Shyamabai PW-2 and Haricharan Soni PW-3 complete silence about the presence of Dr. Manoj at the scene of occurrence during the entire incident creates an element of doubt.

19. Thus, we find that charge under Sections 341 & 323 of the I.P.C. in relation to wrongful restraint of Dr. Manoj and for voluntarily causing hurt to him by appellant Shivkumar is not established. So far as charge under Section 323 read with Section 34 of the I.P.C. against remaining appellants is concerned, there is no case of prosecution that all the remaining accused/appellants had formed a common intention to assault Dr. Manoj. Appellants Kanhaiya & Vishnu were not at the scene of occurrence at that time. Even Pergiabai PW-6 does not say anything

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about it. Dehati Nalishi Ex.P-1 does not say a word about it. We therefore, conclude that the prosecution has failed to establish charge under Sections 341 & 323 of the I.P.C. against appellant Shivkumar and charge under Section 323 read with Section 34 of the I.P.C. against appellants Kanhaiya & Vishnu regarding causing hurt to Dr. Manoj in furtherance of common intention of the co-accused.

20. Haricharan Soni (PW-3) is brother of the deceased and son of Shyamabai (PW-2) and brother of Ramesh Soni (PW-1). As per the Dehati Nalishi lodged by him he had reached the spot when deceased Shyamacharan and Ramesh Soni (PW-1) are alleged to have gone to intervene between the mar pit taking place by appellant Shivkumar with Dr. Manoj. In the Dehati Nalishi Ex.P-1 it was stated that when Shyamacharan went to intervene, Shivkumar started beating him. Seeing this, his mother Shyamabai (PW-2) and brother Ramesh Soni went there whereupon, appellants Vishnu & Kanhaiya also came running from their house. Ramesh Soni (PW-1) has in his testimony stated that when his elder brother Shyamacharan went to intervene appellant Shivkumar had dealt a Lathi blow on the waist of Shyamacharan, whereupon Shyamacharan had fallen down. It is at this juncture that appellants Vishnu & Kanhaiya and the witnesses namely, Ramesh (PW-1) & Shyamabai (PW-2) come to the place of occurrence. The testimony of Ramesh Soni is corroborated by Shyamabai (PW-2) also. The post-mortem report of Shyamacharan Ex.P-24 also mentions that there was one contusion on the right side of chest at the level of 7th rib, one abrasion over the interior aspect of left knee and one lacerated wound over the posterior lateral aspect of fore arm with clotted blood present. These were the injuries which the deceased must have sustained due to the assault by Shivkumar by Lathi.

21. Ramesh (PW-1) has in paragraph 5 stated that soon after Shyamacharan was assaulted by Shivkumar by Lathi and had fallen down appellants Vishnu & Kanhaiya came to the spot and thereafter, all the

three appellants i.e. Vishnu, Kanhaiya & Shivkumar dragged Shyamacharan towards the house of Raju Soni. If we look at the spot map prepared by Sub Inspector K.P. Banjare (PW-15) we find that it is a distance of at least about 150 yards. It was also stated that appellant Shivkumar was instigating his mother Vimlabai to bring sword to kill Shyamacharan. Shyamabai (PW-2) has also corroborated the testimony of Ramesh Soni (PW-1). However, the above testimony appears to be mere exaggeration since in the Dehati Nalishi Ex.P-1 lodged by Haricharan Soni it was not stated that Shyamacharan was dragged by the three appellants for about 150 yards towards the house of Raju Soni. Medical evidence also does not corroborate this. It is also not mentioned in the Dehati Nalishi that appellant Shivkumar had instigated his mother or the other appellants to bring sword to kill Shyamacharan.

22. However, it is borne out from the fully corroborated testimony of Rameshchand (PW-1), Shyamabai (PW-2) & Haricharan Soni (PW-3) that the three appellants had assembled together at the place of occurrence, appellant Vishnu was holding a scissor and appellant Kanhiaya was holding an iron rod (pipe). The presence of appellants Vishnu, Kanhaiya & Shivkumar near the house of Raju where Shyamacharan was assaulted after being singly assaulted by appellant Shivkumar by Lathi, clearly shows that appellants Vishnu, Kanhaiya & Shivkumar were present at the place of occurrence and were armed with scissor, iron rod (pipe) & Lathi, respectively. Dehati Nalishi (Ex.P-1) which was lodged immediately after the occurrence also fully corroborates the testimony of PWs 1, 2 & 3 to that effect.

23. The prosecution did not examine Krishna Kumar and Kunwaria Bai who were named as eyewitnesses in Dehati Nalishi (Ex.P-1) by Haricharan Soni (PW-3). Both these witnesses were given up by the Assistant Public Prosecutor on 20-4-1999 as it would only be a repetition of evidence. The trial Court also did not insist upon examination of these

witnesses. We strongly disapprove of this practice, as it is the duty of the trial Court to insist upon examination of eyewitnesses. However, the presence of Rameshchand Soni (PW-1), Shyamabai (PW-2) and Haricharan Soni (PW-3) at the place of occurrence cannot be doubted, because these witnesses had also sustained injuries during the occurrence while no injury was found on the persons of appellants Shivkumar & Vishnu. Dr. K.K. Ramteke (PW-11) who had medically examined appellants Shivkumar & Vishnu on 2-7-1998 did not find any external injury on these two appellants. There is absolutely nothing on record to show that appellant Kanhaiya had sustained any injury during the occurrence or that Ramesh (PW-1), Shyamabai (PW-2) & Haricharan Soni (PW-3) were armed with any weapon during the occurrence or had assaulted the appellants.

24. Shyamabai (PW-2) has stated that after sending Ramesh Soni to see what was happening she had gone inside the house to wake up her 2nd son Haricharan. Some time must have been spent during this interval. Haricharan (PW-3) has also not stated about witnessing the assault by Shivkumar on Manoj or on Shyamacharan, but has stated that when he came out of the house he saw that appellants Shivkumar, Kanhaiya & Vishnu were assaulting Shyamacharan by Lathi, rod & scissor, respectively. So far as the testimony of these witnesses is concerned, we have gone through the same minutely and find that it is not only corroborated by the Dehati Nalishi (Ex.P-1) lodged immediately after the occurrence, but also by the post-mortem report of Shyamacharan in which Shyamacharan had not only sustained two penetrating injuries, one on the right side of chest and another on the left upper arm, but had also sustained a contusion, an abrasion and a lacerated wound on right ankle. However, this does not establish that appellants Kanhaiya & Vishnu had formed a common intention with appellant Shivkumar to cause the death of Shyamacharan. So far as appellant Shivkumar is concerned, there is only this much of evidence that he had assaulted Shyamacharan by a Lathi near the waist before the arrival of

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appellants Kanhaiya & Vishnu at the scene of occurrence. There is no reliable evidence to the effect that Shivkumar had instigated other appellants Kanhaiya & Vishnu to kill Shyamacharan. Ramesh Soni (PW-1) in paragraph 5 has only stated that Shivkumar was shouting to his mother Vimlabai, the acquitted accused that "bring swords kill them". Further this part of the testimony is not reliable because, it does not find place in F.I.R. & Dehati Nalishi (Ex.P-1) and this has already been dealt with by us above. The testimony that Shyamacharan was dragged by all the three accused together towards the house of Raju Soni is also untrustworthy, because neither we find a mention of this fact in Dehati Nalishi Ex.P-1, nor does the post-mortem report Ex.P-24 corroborates it. It is not a case where all the three accused persons armed with deadly weapons lay in wait for the deceased and had assaulted him simultaneously. We find that appellant Vishnu had run towards the place of occurrence on seeing Ramesh Soni come to the rescue of Shyamacharan and he was holding a scissor in his hand. But, there is nothing to show that appellants Kanhaiya & Shivkumar had also formed a common intention to cause the death of Shyamacharan. Shyamacharan had sustained only one contusion, which was caused by Shivkumar while he was alone, and apart from this Shyamacharan had sustained only one abrasion on the left knee and one lacerated wound on elbow joint, which could be caused by hard and blunt object.

25. Though the prosecution evidence shows that appellant Shivkumar was armed with Lathi and Kanhaiya with iron pipe, we are unable to subscribe to the view of learned Panel Lawyer for the State that appellants Shivkumar & Kanhaiya had formed a common intention along with appellant Vishnu to cause the death of Shyamacharan, and in furtherance thereof appellant Vishnu had committed the murder of Shyamacharan. No blood like stains have been found on the clothes seized from appellants Shivkumar & Kanhaiya, whereas, blood stains have been confirmed only on Baniyan and scissor seized from appellant Vishnu vide Ex.P-14.

26. So far as the testimony of PW-1 Ramesh Soni, Shyamabai (PW-2) and Haricharan Soni (PW-3) that appellant Vishnu had stabbed Shyamacharan on the chest causing a penetrating wound which had pierced the right upper chamber of heart, it is trustworthy. Thereafter, Vishnu had repeatedly inflicted injuries on Ramesh on the chest and other parts of the body, and while Shyamabai tried to cover Ramesh Soni to save from another scissor blow, she also sustained injury by scissor in her head at the hands of appellant Vishnu. It is thus, clear that appellant Vishnu was in a murderous rage and had after causing penetrating stab wound on the chest of Shyamacharan repeatedly assaulted Shyamacharan and had also assaulted Ramesh Soni on the chest and both feet by scissor. After this when he aimed another blow on Ramesh Soni, Shyamabai (PW-2) covered Ramesh to save him, whereupon the scissor blow inflicted by appellant Vishnu fell on the scalp of Shyamabai. The testimony of PW-1 Ramesh Soni, Shyamabai (PW-2) & Haricharan Soni (PW-3) is fully corroborated by medical evidence of Dr. Y.K. Tiwari (PW-18) who had found incised wound on the left side of chest of Ramesh, which in his opinion was a grievous injury, two incised wounds, one on the left leg & one on the right leg, and one incised wound on the left thigh of Ramesh Soni vide report Ex.P-39. Similarly he had found one incised wound at the scalp of Shyamabai on the right parietal region.

27. We have dealt with these injuries in the above paragraphs. We have considered the testimony of PW-1 Ramesh Soni, Shyamabai (PW-2) & Haricharan Soni (PW-3), also the medical evidence of Dr. Y.K. Tiwari (PW-18), and the post-mortem report of Shyamacharan testified by Dr. Harish Kumar Joshi (PW-9), and are satisfied that it is fully established by the prosecution that when appellant Vishnu had come to the scene of occurrence he was in a rage to kill and in that fury he had inflicted fatal blow on the chest of Shyamacharan by scissor and had again dealt another blow with scissor on the left side of chest of

Ramesh Soni, which in the opinion of Dr. Y.K. Tiwari (PW-18) was a grievous injury considering the involvement of vital part. Further incised injuries caused by scissor held by appellant Vishnu on Ramesh Soni taken cumulatively with the incised injury on left side of chest of Ramesh Soni leave no manner of doubt that appellant Vishnu intended to kill Ramesh Soni also and with that intention he had inflicted several incised wounds with scissor on Ramesh Soni one of them being on the left side of chest which was a grievous injury. Considering the nature of injuries sustained by Shyamacharan and the penetrating stab wound caused at the chest which had pierced the left upper chamber of the heart goes to show that appellant Vishnu not only intended to cause the death of Shyamacharan, but also knew that the injury was likely to cause death. Similarly, the injuries caused by appellant Vishnu on Ramesh Soni leave no manner of doubt that he intended to kill Ramesh Soni, because he inflicted an incised wound at the left side of chest of the size of 1" x 1" x 1/2" which was grievous injury and three more incised wounds on the body of Ramesh Soni. Thus, we find that the prosecution has established charge under Section 302 I.P.C. against appellant Vishnu for committing the murder of Shyamacharan, and also under Section 307 I.P.C. against appellant Vishnu for attempting to commit the murder of Ramesh beyond all reasonable doubt. It is further proved beyond doubt by the prosecution that appellant Vishnu had inflicted incised injury by scissor upon Shyamabai when she tried to cover Rameshchandra Soni. Thus, charge under Section 324 I.P.C. against appellant Vishnu is also fully established beyond doubt for voluntarily causing hurt to Shyamabai by means of scissor.

28. So far as the assault by Lathi & rod by appellants Shivkumar & Kanhaiya on Ramesh & Shyamabai is concerned, the testimony of Ramesh (PW-1), Shyamabai (PW-2) & Haricharan Soni (PW-3) fails to inspire confidence, because neither Ramesh nor Shyamabai had sustained any injury on their person which could have been inflicted either by a Lathi or by iron rod or pipe. Shyamabai had sustained only one incised wound

at the scalp and no other injury was found on her person. Similarly, Ramesh had also received four incised wounds and a very superficial abrasion on the hand, which could have been caused by fall. Thus, the testimony relating to assault on Ramesh & Shyamabai by appellants Shivkumar & Kanhaiya in furtherance of the common intention with appellant Vishnu or Shivkumar fails to inspire confidence. The medical evidence clearly negatives any assault by Lathi or iron rod by appellants Shivkumar & Kanhaiya on Ramesh & Shyamabai. This also lends support to the conclusion drawn by us that appellants Kanhaiya & Shivkumar did not share the common intention with appellant Vishnu either to cause the death of Shyamacharan or Ramesh Soni. In view of above discussion, the prosecution has failed to establish that appellants Kanhaiya & Shivkumar were sharing intention with appellant Vishnu for committing murder of Shyamacharan and to attack Ramesh Soni with intention to commit his murder. We, therefore, have no hesitation in holding that charges under Section 302 read with Section 34 I.P.C for committing the murder of Shyamacharan in furtherance of common intention with Vishnu, and charge under Section 307 read with Section 34 I.P.C. for attempting to commit the murder of Ramesh in furtherance of intention with appellant Vishnu is not proved beyond doubt against appellants Kanhaiya & Shivkumar. It is also not established beyond doubt that appellants Kanhaiya & Shivkumar shared the common intention with Vishnu in assaulting Shyamabai by knife and thus, charge under Section 324 read with Section 34 I.P.C. is also not proved against Shivkumar & Kanhaiya.

29. In the ultimate analysis, the appeal is partly allowed.

a. Convictions of appellant Vishnu under Section 302 I.P.C. for committing the murder of Shyamacharan, under Section 307 I.P.C. for attempting to commit the murder of Ramesh, and under Section 324 I.P.C. for voluntarily causing hurt to Shyamabai by means of a sharp weapon i.e. scissor, and the sentences imposed thereunder are maintained. Appellant Vishnu is acquitted of the charge under

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Section 323 read with Section 34 I.P.C. for voluntarily causing simple hurt to Dr. Manoj Kumar in furtherance of common intention of other accused/appellants.

b. Conviction of appellants Shivkumar & Kanhaiya under Section 302 read with Section 34 I.P.C. for sharing common intention with appellant Vishnu to commit the murder of Shyamacharan is set aside and both are acquitted of charge under Section 302 read with Section 34 I.P.C. Similarly, both the appellants Shivkumar & Kanhaiya are acquitted of charge under Section 307 read with Section 34 I.P.C. for sharing common intention with appellant Vishnu to commit the murder of Ramesh Soni. Both Shivkumar & Kanhaiya are also acquitted of the charge under Section 324 read with Section 34 I.P.C. for forming common intention with appellant Vishnu of causing hurt to Shyamabai by means of scissors. Appellant Shivkumar & Kanhaiya are convicted under Section 323 I.P.C. for causing hurt to Shyamacharan and sentenced to undergo R.I. for one year and pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for three months.

c. Conviction of appellant Shivkumar under Sections 341 & 323 I.P.C. for wrongfully restraining Dr. Manoj and voluntarily causing hurt to Dr. Manoj & Ramesh Soni, and sentence awarded thereunder are set aside.

d. Set off under Section 428 Cr.P.C. shall be given to the appellants for the period undergone by them in judicial or Police custody during detention or trial against substantive sentences awarded to them.

Sd/-
L.C.BHADOO
Judge

Sd/-
Dilip Raosaheb Deshmukh
Judge

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